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IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. ~~220~~. 56.

WILLIAM B. WETMORE,
Plaintiff-in-Error,

vs.

ANNETTE B. MARKOE (fomerly Annette B. W. Wetmore),
Defendant-in-Error.

Reply Brief of Plaintiff-in-Error.

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SUPREME COURT OF THE UNITED STATES.

WILLIAM B. WETMORE,
Plaintiff-in-Error,

against

ANNETTE B. MARKOE (formerly Annette B. Wetmore),
Defendant-in-Error.

Reply Brief of Plaintiff-in-Error.

FIRST POINT.

The record shows jurisdiction in this court to entertain the cause.

A.

The application made to the Special Term of the Supreme Court of the State of New York was made as of right, and was not addressed to the favor of the court.

The application was authorized by Section 1268 of the Code of Civil Procedure of New York, which reads as follows:

"At any time after one year has elapsed,

since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it, or filing a transcript thereof, for an order, directing the judgment to be cancelled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment, or the debt upon which such judgment was recovered, an order must be made directing said judgment to be cancelled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same by marking on the docket thereof that the same is cancelled and discharged by order of the court, giving the date of entry of the order of discharge. Where the judgment was a lien on real property owned by the bankrupt prior to the time he was adjudged a bankrupt, the lien thereof upon said real estate shall not be affected by said order and may be enforced, but in all other respects the judgment shall be of no force or validity, nor shall the same be a lien on real property acquired by him subsequent to his discharge in bankruptcy. Notice of the application, accompanied with copies of the papers upon which it is made, must be served upon the judgment-creditor, or his attorney of record in said judgment, in the same manner as prescribed in Sections 796 and 797 of the Code of Civil Procedure, if the residence or place of business of such creditor, or his attorney is known, but if unknown and

cannot be ascertained after due diligence, or if such creditor is a non-resident of this State, and his attorney is dead, removed from, or cannot be found within the State, upon proof of said facts by affidavit a judge of the court may make an order that the notice of such application be published in a newspaper designated therein once a week for not more than three weeks, which publication shown by the affidavit of the publisher shall be sufficient service upon such judgment-creditor, of the application."

This Section is mandatory.

Matter of Brandreth, 14 Hun, 585.

The Section is, however, simply declaratory of the pre-existing practice.

West Philadelphia Bank v. Gerry, 106 N. Y., 467.

In delivering the opinion in the case last cited, DANFORTH, J., referring to Section 1268, said at page 472:

"But the respondent says the provisions of the Code were not enacted until after the decision in those cases. That is true, yet the relief formulated by it had long before been effected by the uniform practice of the courts (Baker v. Judges of Ulster, 4 Johns., 191: Baker v. Taylor, 1 Cow., 165; Alcott v. Avery, 1 Barb., Ch. 347). The Code introduced no new law, but was in conformity with that prac-

tice and affirmatory of it. Its language is not open to doubt; but if it were, the act is remedial and should receive such construction as would advance its object."

B.

The application being of right, the court could not refuse to entertain it because of the alleged contempt of the plaintiff-in-error.

Hovey v. Elliott, 167 U. S., 409.

C.

Had the application been addressed to the favor of the court the plaintiff-in-error should not have been refused a hearing until he was adjudged in contempt.

Palmer v. Palmer, 36 Fla., 385.

In delivering the opinion of the court, in Palmer v. Palmer, TAYLOR, J., said, at page 392:

> "At the June Term, 1891, of this court, the complainant, appellee in this case, moved here to dismiss this bill upon the ground that the defendant (appellant) had been adjudged to be in contempt of the court below for violating its order of injunction in reference to the removal of the children, which contempt, it is claimed, continued, and had not been purged.

In refusing this motion to dismiss, we hold, in effect, that the record here did not show that there had ever been an adjudication in the contempt proceedings against the defendant, and that, in the absence of any proper service of the rule to show cause why she should not be held for contempt, there could not be any proper adjudication against her in that proceeding; for the simple reason that it would be a condemnation without giving her an opportunity to be heard on the charge of contempt preferred against her."

Strong v. Strong, 1 Abb. Pr. N. S., 358.

At page 365, the court said:

"I think, moreover, that it is very doubtful whether the bare fact that a party is charged in *ex parte* affidavits (although there is no denial of them), with having wilfully disobeyed an order of the court will be sufficient to induce the court to withhold a favor from such a party. I am inclined to the opinion that to induce a court to withhold a favor on the ground that the applicant is in contempt, such party must have been adjudged by the court to be in contempt."

It is nowhere disclosed in the record that plaintiff-in-error had been adjudged in contempt, and it is admitted on the brief of the learned counsel for the defendant-in-error that he had not been so adjudged (see page 17 of his brief). It is there urged, however, that "the absence of such an orded (adjudging him in contempt), is explained by the facts disclosed in the record, that the plaintiff-in-error, after

the judgment of divorce was made, left the State of New York, and keeps himself without the jurisdiction of the courts of that State."

As under the New York Code of Civil Procedure service need not have been made upon the plaintiff-in-error personally, but could have been made upon his attorneys had the defendant-in-error desired to have him adjudged in contempt, the absence of the plaintiff-in-error from the State, it is submitted, does not excuse the failure of the defendant-in-error to make the motion.

Code of Civil Procedure, Sections 1773; 14, subdiv. 3; 2266-2269:

Sec. 1773: "Where the husband makes default in paying any sum of money specified in the last Section, as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last Section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in Title third of Chapter seventeenth of this act. Such an order to show cause may also be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual."

Section 14: "A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded or prejudiced, in either of the following cases:

* * * * * * *

"3. A party to an action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court."

Section 2266: "In a case specified in Section 14 of this act, or in any other case where it is specifically prescribed by law, that a court of record, or a judge thereof, or a referee appointed by the court, has power to punish, by fine and imprisonment, or either, or generally as a contempt, a neglect or violation of duty, or other misconduct; and a right or remedy of a party to a civil action or special proceeding pending in the court, or before the judge or the referee, may be defeated, impaired, impeded or prejudiced thereby, the offence must be punished as prescribed in this title."

Section 2267: "When the offence is committed in the immediate view and presence of the court, or of the judge or referee, upon a

trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge or referee, stating the facts which constitute the offence, and bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor."

Section 2268: "Where the offence consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected, it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law."

Section 2269: "The court, or judge, authorized to punish for the offence, may, in its or his discretion, where the case is one of those specified in either of the last two sections, and, in every other case, must upon being satisfied, by affidavit, of the commission of the offense, either

"1. Make an order, requiring the accused to show cause before it or him, at a time and place therein specified, why the accused should not be punished for the alleged offence; or

"2. Issue a warrant of attachment, directed to the sheriff of a particular county, or generally, to the sheriff of any county where the

accused may be found, commanding him to arrest the accused, and bring him before the court or judge either forthwith, or at a time and place therein specified, to answer for the alleged offence."

Pitt v. Davison, 37 N. Y., 235.
Isaacs v. Calder, 42 App. Div., 152.

D.

The Special Term Justice, in whom the discretion vested, if it existed at all, to refuse to entertain this application, regardless of its merits, having in fact denied the application because, in his opinion, the Bankrupt Act did not discharge such a claim, it should be assumed that a court affirming such a decision without opinion, affirmed it for the reason given by the Special Term Justice.

If such an assumption is not to be made in this case, then decisions without opinions are of very little use as precedents, since it cannot be said that any such decision stands for any further proposition than that a given party should or should not succeed.

The case of Rogers v. Decker, cited by the learned counsel for defendant-in-error on page 8 of his brief, stands only for the elementary principle that an affirmance without an opinion does not make the affirming court responsible for all of the reasons

that may have been assigned by the court below.

That the Special Term justice denied the application on a ground involving a federal statute is conceded. The memorandum filed by him on denying the motion is found at folio 262 of the record in this case, and reads as follows:

> "Motion denied with $10 costs, upon the authority of *Re* Anderson, 97 Fed. Rep., 321; Maisner v. Maisner, 62 App. Div., 286; Audobon v. Schufeldt, 181 U. S., 575."

E.

The application of the plaintiff-in-error to the Special Term, being duly authorized by law, the fact that he might have pursued some other method does not deprive this court of jurisdiction to review this case.

On page 11 of his brief the learned counsel urges as a reason why this court has not jurisdiction, that the plaintiff-in-error might have pursued some other remedy by which the case could have been passed upon by the Court of Appeals without a certificate from the Appellate Division permitting an appeal to that court. It is certainly a novel proposition that one who has pursued a perfectly proper remedy and has had his application denied by the highest court of record in the state having jurisdiction to pass upon the application is to be denied relief by this court for the reason that, had some other remedy been pursued, the Court of Appeals would have had jurisdiction as a matter

of right. It can hardly be seriously urged that this plaintiff-in-error, who committed no error in the remedy pursued by him, is as a consequence precluded from availing himself of the benefit of the Bankrupt Law. Yet, if the defendant-in-error is right in his contention, such would seem to be the result, as the question is now, so far as the state courts are concerned, *res adjudicata.*

SECOND POINT.

It is not for this court to determine whether or not the plaintiff-in-error is in contempt of the Supreme Court of the State of New York.

The learned counsel cites no case in support of the second point on his brief, that this court should not entertain jurisdiction because of the alleged contempt of the Supreme Court of the State of New York. That he does not do so is probably accounted for by the existence of the fundamental principle that one court does not concern itself with the contempts of another court.

Strong v. Strong, 1 Abb. Pr. N. S., 358.

Furthermore, it must be remembered that this plaintiff-in-error has never been adjudged in contempt. It must also be remembered that unless the application was addressed to the favor of the court, the question of contempt is of no moment.

THIRD POINT.

It is not the contention of the plaintiff-in-error that a decree for the payment of alimony necessarily creates a debt.

Alimony awarded in New York since 1895 is not a debt within the meaning of the Bankrupt Law, for the reason that since that date the decree has been subject to alteration or modification by the court, even though no provision is made therefor in the judgment awarding the alimony.

> New York Laws, 1895, Chapter 891.
> New York Code of Civil Procedure, Sec. 1759.

Nor is alimony awarded prior to 1895 under a judgment which by its terms was subject to modification or alteration by the court a debt within the meaning of the Bankrupt Law.

The learned counsel for the defendant-in-error points out as an objection to our position that there is some alimony which cannot be regarded as a debt. If that fact was not fully appreciated and conceded by the plaintiff-in-error, he could not, in view of the decision of this court in Audobon v. Schufeldt, 181 U. S., 575, appear here in good faith.

The learned counsel for the defendant-in-error suggests at page 29 of his brief that "even though the court may have power to modify a decree, still, until such discretion is exercised, the amount due is equally as much a fixed liability as is the amount

due under a decree for which the court has not such jurisdiction."

It would seem to be a sufficient reply to this suggestion to say that a liability which is subject to the control of the court, either as to its amount or existence, or both, cannot be said to be "absolutely owing at the time of the filing of the petition." Such was the opinion of Mr. Justice Gray as expressed by him in Audobon v. Schufeldt, at page 577; of the report of that case, which will be found quoted in the main brief of plaintiff-in-error, at page 20.

FOURTH POINT.

The plaintiff-in-error does not contend that a judgment for alimony represents a debt reduced to a judgment. His contention is that as the law of New York stood when alimony was awarded the defendant-in-error the judgment awarding it was a fixed liability evidenced by a judgment.

In the consideration of this case, the character of the duty of the husband to support his wife is immaterial. It is equally immaterial whether or not alimony when awarded constitutes a debt according to the common law conception of a debt. Neither are we concerned with the question of whether a man is under a moral duty to support another

man's wife, as this plaintiff-in-error is required to do.

The simple question is whether a judgment for a fixed amount, absolutely and unalterably owing —so unalterably owing that it is beyond the power of the legislature or the court to change it in any particular—is within the meaning of Section 63 of the Bankrupt Act, "a fixed liability as evidenced by a judgment * * * absolutely owing."

FIFTH POINT.

It is not within the power of a Court of New York to preclude a plaintiff indirectly from recovering the amount of alimony granted prior to 1895.

The learned counsel for the defendant-in-error, at page 29 of his brief, says:

> "A decree providing for alimony is not in its nature an ordinary judgment for a fixed liability. While the court could not, perhaps, change the amount, it could indirectly preclude the plaintiff from recovering the amount."

He then proceeds to cite sections of the Code showing that a plaintiff to whom alimony has been awarded has rights not conferred upon the ordinary judgment creditor. But he neither cites, nor can he refer the court to any statute, section of the code, nor reported decision holding in accord with his statement that the court can "indirectly pre-

clude the plaintiff from recovering the amount." That the plaintiff to whom alimony is awarded has remedies additional to those conferred upon the ordinary judgment creditor certainly does not establish the proposition. The fact that a defendant in arrears for alimony is subject to arrest, notwithstanding imprisonment for debt is abolished, does not establish the proposition. The fact that the court can require the defendant to give security for carrying out the decree of the court does not establish the proposition. The fact that the court, if he fails to give security or make payments as directed by the court, may cause his personal property, and the rents and profits of his real estate to be sequestered, and may appoint a receiver, thereof, does not establish the proposition. Neither does the fact that such a defendant, who has been imprisoned for non-compliance with the order of the court may be released from imprisonment, establish such a proposition. Nor can such proposition be established. (See page 9 of the main brief of plaintiff-in-error.)

The citations by the learned counsel may show that a judgment for alimony is not regarded as an "ordinary judgment." But do they show that the obligation in this case is not "a fixed liability, evidenced by a judgment, * * * absolutely owing", within the meaning of Section 63 of the Bankrupt Act? There is nothing said about an extraordinary judgment in the Bankrupt Act, and a judgment, the holder of which is given unusual remedies, is still a judgment.

SIXTH POINT.

The alimony awarded to the defendant-in-error was not given as compensation for a "wilful and malicious injury to her person or property."

It is respectfully submitted that the question to be considered in this connection is not whether the plaintiff's rights were violated, either as to her person or property, but whether the alimony awarded to her is to be regarded as compensation for ~~a contempt~~ an injury committed.

To conceive of a divorce suit as in its essence an action of tort is a proposition which required a vivid imagination, such as the learned author of Bishop on Marriage and Divorce, had.

In the case cited by the learned author, Mangles v. Mangles, 6 Mo. App., 481, 484, the following language is found :

> "Nor is the action for divorce an action of tort."

That a wife cannot maintain an action against her husband for such a tort as the defendant-in-error contends was committed in this case, is conceded by the learned counsel for the defendant-in-error (see page 33 of his brief).

Is alimony, then, as awarded by the courts of New York, to be regarded as a sum of money given to a wife in lieu of damages for an injury done her ~~in~~ a

wilful injury to her person or her property? In the absence of statute, there was no jurisdiction in the courts of New York to grant a divorce as distinguished from annulling a marriage for causes existing prior to the marriage.

> Erkenbrach v. Erkenbrach, 96 N. Y., 456, 463.

The authority of the court to make an award of alimony is purely statutory.

> Erkenbrach v. Erkenbrach, 96 N. Y., 462.

That authority is found in Subdivision 2 of Section 1759 of the Code of Civil Procedure, which, so far as pertinent to this case, reads as follows:

> "The court may, in the final judgment dissolving the marriage, require the defendant *to provide suitably for the education and maintenance of the children of the marriage and for the support of plaintiff* as justice requires, having regard to the circumstances of the respective parties."

It will be noticed that by this section the husband may be required *to provide suitably for the education and maintenance of the children of the marriage and for the support of plaintiff* as justice requires, having regard to the circumstances of the respective parties.

There is no suggestion here of a penalty. There is no suggestion of awarding damages. Nor is any such suggestion found in the cases decided under this law.

In the Matter of the estate of Ensign, 103 N. Y., 284, FINCH, J., says, at page 289:

> "When the court dissolves the marriage contract at the suit of the innocent wife, it is

authorized to decree the payment to her of a suitable allowance. And why is that? If any martial right continues after the divorce, the wife remains entitled to her support and may nforce it in the ordinary way. On the contrary, the statute recognizes that when the marriage tie is broken, and the relation ended, no future rights will remain in the wife and no future obligations bind the husband which have their root in the marriage relation. *The court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife which the divorce cuts off and forbids in the future.* The tribunal granting the decree investigates the husband's financial condition, takes proof of the value of his property, and then makes a suitable allowance for her life, and so puts the decree and its power in the place and room of what is lost in the future."

Dated November 7, 1904.

Respectfully Submitted,
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